tineau v. *Kitching*, L. R. 7 Q. B. 436; *Scott* v. *Wells*, 6 W. & S. 362. The absence of a bill of sale, accepted delivery order or warehouse receipt was absolutely immaterial, because they would only be evidence to prove what was admitted.

H. G. W.

Court of Appeals of Kentucky.

PERRY *v.* WHEELER ET AL.

Civil courts cannot re-judge the judgment of an ecclesiastical tribunal in matters within the latter's jurisdiction; but the decision of such tribunal upon its own jurisdiction over the subject-matter is not exclusive. The control of the civil courts over the civil rights of the citizens cannot be ousted.

A board of reference under canon 4 of the Protestant Episcopal Church is an ecclesiastical court, and the civil courts may inquire into its organization and decide whether it has acted within the scope of its constitutional authority.

The word "permanently," as used in the call of a rector, means indefinitely, and constitutes a contract that he should continue to hold the office of rector till one or the other of the parties desires to terminate the relation, and then to be terminated after reasonable notice and with the approval of the ecclesiastical authority of the diocese.

Certain canons of the Episcopal Church construed.

The decisions of the state courts upon the rights of parties under state laws are final and binding upon the federal courts, and a decision of the latter, which is in opposition to the construction of state laws given by the highest court of the state, will not be regarded by the state courts.

Watson v. *Jones*, 13 Wall. 679, reviewed and dissented from.

THIS was an action by Perry to recover salary alleged to be due him by defendants. The facts were substantially as follows: On September 1st 1866 the wardens and vestry of Grace Church at Hopkinsville, Ky., addressed a letter to plaintiff in the following words:—

"Dear Sir: By the unanimous vote of the members of Grace Church, Hopkinsville, taken at a meeting held on Thursday last, the vestry were authorized to submit the following to your consideration:—

"Be it resolved, and hereby it is resolved, that the Rev. G. B. Perry, D. D., be, and hereby is, elected *permanently* to the rectorship of Grace Church, Hopkinsville, at a salary of ——— dollars per annum, to be paid quarterly, each quarter respectively *in advance, with the free use also of rectory grounds*, as soon as vacated by present occupant.

"Resolved, that said blank in regard to salary be hereafter filled."

The proposition was accepted in writing by plaintiff, and in May 1868 the vestry passed a resolution that the annual salary of plaintiff should be "not less than $600, to commence at the beginning of the church year of his settlement as pastor."

In August 1871, a resolution was adopted by the vestry to the effect that for the year ending September 1st 1872 Dr. Perry should receive the sum of not less than $500. The adoption of this resolution resulted in a controversy between the rector and his congregation, and the breach continued to widen until finally application was made, by persons representing the congregation, to the bishop of the diocese, for the appointment of a board of reference to investigate the facts, and to determine whether or not it was possible to terminate the controversy, and, if not, to prescribe the terms upon which a dissolution of the relations existing between the rector and the congregation should be had.

The board was appointed. It met and organized at Hopkinsville, February 7th 1872. It determined that a dissolution was necessary, and rendered this judgment or recommendation :—

"And we do hereby recommend that such dissolution should take effect on the 1st day of March 1872, upon the following terms, to wit :—

"1. That the vestry or congregation pay to Dr. Perry all arrears due on his salary up to the 1st of September 1871, counting such salary to be $600 per annum.

"2. That Dr. Perry be allowed the use of the rectory and grounds attached thereto up to the 1st of June 1872.

"These conditions we would make *mandatory.* In addition to these, we would request and *recommend* to the vestry that they should pay to Dr. Perry at the same rate of $600 per annum up to the 1st of March 1872, while we make it *imperative* that they *shall* pay him at the rate of $500 per annum from September 1st 1871 to March 1st 1872."

This finding was signed by four of the board of reference and was reported to and approved by the bishop. Dr. Perry declined to surrender the rectory and grounds, and declined to acknowledge the binding obligation of the action of the board as construed by the bishop, and the result was, his suspension from the right to exercise clerical and ministerial functions within this diocese, until his alleged contumacious disobedience should cease.

Matters remained in this condition until July 1875, when Dr. Perry instituted this action, claiming that the wardens, vestry and

congregation were indebted to him for salary due and in arrears in the sum of over $3000, and seeking to have the rectory and grounds held and owned by the church subject to the judgment of his claim.

The facts touching the dissolution of the relationship between Dr. Perry and the congregation were set up by the defendants in their answer. It was averred that the sum of money due to Dr. Perry by the terms of the finding of board of reference had been tendered him, and that he had refused to accept the tender, and, by way of cross-action, they alleged that he had wrongfully withheld the possession of the rectory and grounds from the 1st day of June 1872, up to the time at which they answered, and they prayed that he should be charged with reasonable rents therefor, and that said rents should be set off against any claim he might have for arrearages of salary. The reply of Dr. Perry raised a proper issue as to this claim. The cause was submitted, and a judgment rendered, requiring the appellant to surrender the rectory and grounds, and setting off rents against the sum awarded him by the board of reference, and dismissing his petition. To reverse that judgment he prosecuted this appeal.

Ritter & Payne, and *McPherson & Champlin*, for appellant.

Petree & Littell, and *Campbell & Ferguson*, for appellees.

The opinion of the court was delivered by

LINDSAY, C. J.—Appellant, by his counsel, insists that he was the *permanent* rector of Grace Church, and had the right to retain his position during life, unless he should become incapacitated for the performance of clerical duties by age or disease, or unless he should disqualify himself by immoral or unchristian conduct, or by the abandonment of the faith and the practices of the Protestant Episcopal Church. He certainly was elected permanent rector, but we do not understand the term permanent, as used in the call, to mean that the parties were to be bound together by ties to be dissolved only by mutual consent, or for sufficient legal or ecclesiastical reasons. A connection of that character might, and in some cases probably would, result in compelling an unwilling pastor to remain with his congregation, or a dissatisfied congregation to retain and pay an unpopular and distasteful minister, after the feelings of estrangement had become so intense that the continuance of the pastoral relation would tend to tear down and destroy, rather than to preserve or build up, the cause of Christianity, and the moral and religious interests of the local church.

We understand that Dr. Perry was called as the rector of the church for an indefinite period, and that it was intended he should continue to hold the place until one or the other of the contracting parties should desire to terminate the connection, in which case the dissatisfied party was to have the right to be relieved of further obligations to the other, upon fair equitable terms, and after reasonable notice, and with the concurrence or approval of the ecclesiastical authority of the diocese.

Appellant denies that he is any way bound by the action of the board of reference. This board was composed of but four of the five presbyters appointed, and he insists that, by the canons of the Protestant Episcopal Church, the presence and participation of five members are indispensably necessary to constitute a legal and constitutional tribunal of that character.

Upon the other hand, it is claimed that this is not a proper question for the consideration of the secular courts, that they have no right to inquire whether an ecclesiastical tribunal has exceeded its lawful powers, and that the action of one of those tribunals is conclusive in a legal controversy, not only as to the merits of the question it may have decided, but also as to its power and jurisdiction over the subject-matter of the dispute, and of the parties concerned, until such action shall have been reversed, annulled, or modified by some higher church judicatory.

This is not a new question in this court. The rule by which the legal tribunals are guided in cases of this character was thus stated in the case of *Watson* v. *Avery*, 2 Bush 332:—

"While we recognise the principle as firmly established that civil courts cannot and ought not to re-judge the judgments of spiritual tribunals as to matters within their jurisdiction, whether justly or unjustly decided, we cannot accept as correct the principle contended for in argument for the appellees, that whether the synod had jurisdiction and power over the subject on which it acted under the presbyterial system is a question purely ecclesiastical, to be settled by the Synod itself and the General Assembly. Such a construction of the powers of church tribunals would, in our opinion, subject all individual and property rights confided or dedicated to the use of religious organizations to the arbitrary will of those who may constitute their judicatories and representative bodies without regard to any of the regulations or constitutional restraints by which, according to the principles and objects of such organizations, it was

intended that said individual and property rights should be protected," and that "when rights of property, which are secured to congregations and individuals by the organic law of the church, are violated by unconstitutional acts of the higher courts, the parties thus aggrieved are entitled to relief in the civil courts as in ordinary cases of injury resulting from the violation of a contract or the fundamental law of a voluntary association."

This rule was again announced and elaborated in the case of *Gartin* v. *Penick*, 9 Am. Law Reg. N. S. 210, s. c. 5 Bush 110. But our attention is called to the fact that the doctrine of these cases was rejected and repudiated by the Supreme Court of the United States in the case of *Watson* v. *Jones*, 13 Wallace 679.

There are various reasons why we should not allow the rules of property or of individual rights under the protection of the laws of this state to be shaped and controlled by the principles of that opinion. The then chief justice and Mr. Justice NELSON did not participate in the consideration or the decision of that case, and the jurisdiction of the federal judiciary was denied by Justices CLIFFORD and DAVIS, and their position is sustained by the weight of authority.

Then we deny without qualification the rights of the federal courts to set up and enforce within the territorial limits of Kentucky a rule of property affecting title to real estate, different from, and subversive of, the laws of this Commonwealth as construed and expounded by this court. The Constitution of the Supreme Court of the United States "requires it to follow the laws of the several states as rules of decisions whenever they apply. And the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state, especially when applied to the title to land:" *Beauregard* v. *New Orleans*, 18 Howard 502.

And in the case of *Gelpcke* v. *City of Dubuque*, 1 Wallace 177, where this rule was not observed, the court felt constrained to say: "We are not unmindful of the importance of uniformity of the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own states. It is the settled rule of this court to follow the decisions of the state courts." And the reason why the decision of the Supreme Court of Iowa was not followed, in that case, was because that court had changed its opinions as to the constitutionality of certain state leg-

islation, and thus destroyed the alleged rights of parties who had contracted upon the faith of an older and different opinion.

And even under that state of facts, Mr. Justice MILLER declared, in a dissenting opinion, after a full and careful review of all the cases, that the advance then taken by the Supreme Court was in the direction of a usurpation of the right belonging to the state courts to decide as a finality upon the construction of state constitutions and state statutes.

The questions involved in the case of *Watson* v. *Jones*, affected the title to, and the use of real estate, and were dependent upon the proper construction of the statutes, and the common law of this state. They had been fully investigated and finally decided by the state courts, and the effect of the majority opinion of the Supreme Court in that case was to approve a re-trial of the same issues, between substantially the same parties, and of the rejection of the construction of the laws of this state adopted by its own courts, and of the practical reversal by the Federal Circuit Court of the decision of the highest judicial tribunal of a sovereign state.

And it was not attempted to justify or excuse this departure from the precedents of the Supreme Court, by showing the existence of any single fact deemed sufficient to constitute an exception to the general and well-established practice of that court.

Under these circumstances it was not to be expected the majority opinion in the case of *Watson* v. *Jones* would become a controlling precedent. And we very soon find the Supreme Court returning, and (except in a few professedly exceptional cases), afterwards steadily adhering to the ancient and almost universal rule, that the decisions of state tribunals, as to the true construction of their own laws, are binding upon the federal judiciary: *Walker* v. *State Harbor Commissioners*, 17 Wall. 648; *Galpin* v. *Page*, 18 Id. 350; *Bailey* v. *McGuire*, 22 Id. 215; and *Secombe* v. *The Railroad Company*, 23 Id. 108.

And it will also be seen by an examination of the case of *Bouldin* v. *Alexander*, 15 Wall. 131, that the Supreme Court substantially abandoned the ruling in *Watson* v. *Jones*, as to the power of secular courts to pass upon the jurisdiction of bodies of persons claiming to act as ecclesiastical courts; and actually inquired into the constitution and manual of the Baptist Church, and decided as matter of church law that the minority of the members of a Baptist congregation have no power, under the constitution of their church, to

remove trustees from office, or to exclude other persons from membership; and, finally, that the attempted exscinding of the majority of the members by the minority, who were in the possession of the church edifice, and who claimed to constitute the true body of the church, was wholly inoperative and void. And as to the removal of the trustees, the court said the attempt was a nullity, because it is "certain that they cannot be removed from their trusteeships by a minority of the church society or meeting, *without warning, and acting without charges, without citation or trial, and in direct contravention of the church rules.*"

It is thus made plain that the federal court looked into the constitution and rules of the church, and decided against the ecclesiastical power of this minority to remove trustees, just as this court examined the constitution of the Presbyterian church and decided that the Synod and General Assembly had no ecclesiastical power to make valid and binding the irregular and unauthorized action of certain members of the Walnut Street Church in the appointment of ruling elders, who were to participate in the management and control of the property and temporalities of that congregation, by proceedings unknown to, and impliedly prohibited by, the fundamental law of the general church.

It is true that in *Bouldin's case* the Supreme Court intimates that there is a difference between churches having a general organization with ecclesiastical tribunals possessing certain general and ultimate powers of control, and churches where the congregations are strictly independent of their ecclesiastical associates. But this difference does not authorize the application to the one class of churches of a principle radically different from that applied to the others. The congregational churches and their members are as free from, and as independent of, secular control as the churches held together by general organizations. And if the shadowy distinction under consideration does not owe its prominence to the necessities of the case of *Watson* v. *Jones*, it is certain that it can no more be upheld and maintained on principle, than can the insinuation, or rather the charge, made in the majority opinion in that case to the effect that the three upright and learned judges who joined in the decision of this court in *Watson* v. *Avery*, were capable, "under cover of inquiring into jurisdiction" of the Synod and General Assembly of the Presbyterian church, of re-trying the merits of the controversy, and of substituting their own judgment

for that of their ecclesiastical tribunals, can be regarded "*as suited to the dispassionate dignity*" of the Supreme Court of the United States, or "*as respectful to another court of at least concurrent jurisdiction over the matter in question.*"

We are satisfied that the difference in the organization of the various churches can work no difference in the principle by which legal tribunals are to be governed when required to deal with the action of ecclesiastical bodies, and we do not doubt our power to inquire into the organization of the board of reference, and to decide whether it acted without the scope of its constitutional jurisdiction. It was called into existence, and organized and acted under the provisions of sections 1 and 2 of canon 4, title 2, of the Digest of the Canons of the Protestant Episcopal Church in the United States. Said canon provides as follows:—

"§ 1. In case of a controversy between any rector or assistant minister of any church or parish, which cannot be settled by themselves, the parties, or either of them, may make application to the bishop of the diocese, who shall thereupon notify each of the contesting parties to furnish him with the names of three presbyters in the diocese. The bishop shall add to them the names of three other presbyters, and the whole number shall then be reduced to *five* by striking off the names alternately, by each of the contesting parties. Should either party refuse or neglect to name three presbyters, or to strike from the list as aforesaid, the bishop shall act for the parties so refusing or neglecting. And in all the proceedings aforesaid, the vestry or congregation, as the case may be, shall be represented by some layman of their number, duly selected by them for the purpose, provided that the party or parties applying as above shall have first given the bishop satisfactory assurance of compliance with whatever may be required of them as the final issue of such proceedings."

"§ 2. *The five presbyters thus designated shall constitute a board of reference to consider such controversy*; and if, after hearing such allegations and proofs as the parties may submit, a majority of the presbyters shall be of opinion that there is no hope of a favorable termination of such controversy, and that a dissolution of the connection between such rector or assistant minister and his parish or congregation is necessary to restore the peace of the church and promote its prosperity, such presbyters shall recommend to the bishop that such minister shall be required to relinquish his

connection with such church or parish on such conditions as may appear to them proper and reasonable."

Appellant insists that the proceedings to be had before a board of reference are in the nature of an arbitration; that the members of the board are arbitrators, and that the submission of the matters in dispute being to the five members jointly, they must all act together, and must each and all be present, and participate from the commencement to the conclusion of the proceedings.

The board differs in many regards from a board of arbitrators. It is an ecclesiastical court, provided for by the laws of the church, and the parties cannot defeat its action by refusing or declining to submit themselves to its jurisdiction. It is charged with the duty of settling a question of church policy and its recommendations to the bishop as to the legal rights of the parties rest upon, and are incident to, its primary power to determine whether the connection between the rector and the parish should be dissolved. In passing upon the primary and purely ecclesiastical question, the board is a church court, and in no sense a board of arbitrators. But if upon general principles we had a doubt as to the proper constitution of the board, that doubt would be removed by the provision of title 3, canon 7, that, "in all cases in which a canon of the General Convention directs a duty to be performed, or a power to be exercised by a standing committee, or by the clerical members thereof, or by any other body consisting of several members, a majority of said members, the whole having been duly cited to meet, shall be a quorum, and a majority of that quorum, so convened, shall be competent to act, unless the contrary is expressly required by the canon."

This provision includes boards of reference, and the canon providing for their constitution and organization does not expressly, or even by fair implication, require that all of the five members shall act.

We conclude that the board acting in this case was legally organized, and that it kept within the scope of its powers, and hence that its recommendations, approved as they have been by the bishop of the diocese, must be respected by the civil tribunals.

Another objection urged to the action of the board is, that the canon under which it was appointed was not adopted by the General Convention of the church until after Dr. Perry had entered into his contract with Grace Church. This canon was not intended to, and

does not operate to give either of the parties a new, nor to take from either an existing right. It is in the nature of a remedial statute, and merely prescribes the manner in which the existence of the facts authorizing a dissolution of the connection between a rector and his congregation shall be ascertained, and the terms and conditions of the dissolution fixed and determined.

As we have already seen, the rights of the contracting parties to have this relief existed from the beginning, and grew out of the very nature of their contract; and it seems manifest that in adopting this canon, the convention exercised only a reasonable, necessary, and unquestionable ecclesiastical power.

It was the duty of Dr. Perry to surrender the possession of the rectory and grounds on the 1st day of June 1872; and the failure of the appellees to pay him the arrearages due on his salary did not excuse him from the performance of that duty. The dissolution of the pastoral connection, and the surrender of the church property were not made to depend upon the performance by the congregation of the duties imposed upon it by the board of reference.

The tender of the arrearages of salary to appellant was not good in law, and did not stop the accrual of interest; but as the reasonable rents of the property wrongfully withheld by the appellant greatly exceed in amount the principal of the sum due him, with its accrued interest, we need not discuss that question.

The court below did not err in setting off the rents against the claim for salary, nor in requiring the appellant to surrender the possession of the rectory and grounds.

Wherefore its judgment must be affirmed.

Three interesting legal questions are involved in the decision of the foregoing case.

1. The nature of the contract between a minister and his church.

2. The power of ecclesiastical judicatories to dissolve the contractual relations entered into between a minister and a church upon his settlement.

3. How far the civil courts will enforce rights based upon these ecclesiastical relations and review the decrees of ecclesiastical courts upon the ecclesiastical status and rights of the parties.

As preliminary to the discussion of these questions, it may be remarked, that the relation our religious institutions bear to the state are so different from the relations established in the country from which we derive the body of the common law, that no certain rule of decision for us can be derived from the study of English ecclesiastical cases: *Robertson* v. *Bullions*, 9 Barb. 64.

1. The American cases, arising as they do in several of the different denominations into which the American church is divided, show very clearly that among them all the contractual relation established between a minister and a congregation upon his settlement over them is a permanent relation, and can not be

dissolved by either party of their own motion without the consent of the other. This conclusion necessarily follows from the fair construction of the words of the call, or invitation usually sent by a congregation to a minister with whom they desire to establish this relation. The call sent in the principal case is substantially like the call extended to a minister in all the churches. It is in form a request, from the congregation to the minister, to settle himself over them, to devote himself to the work of the ministry in accordance with the rules of the church with which the congregation is connected; the congregation promising, in return therefor, to give him a competent livelihood and support. In some portions of the New England states where the congregational form of church polity prevails in connection with the political divisions of towns, the call is extended by the congregation and town jointly at a town meeting. In *Avery* v. *Tyrringham*, 3 Mass. 160, which was an action by a minister against a town for services rendered by him as a minister thus settled over the town, the defendant offered in evidence a resolution of the town adopted at a town meeting previously to the services declared for, in which they resolved, without stating any reason, that they would no longer consider the plaintiff their minister. This evidence was excluded by the court, upon the principle already stated that the contract was permanent, and could not be dissolved by the town by a simple resolution. In *Gibbs* v. *Gilead Society*, 38 Conn. 153, and *Worrell* v. *Church*, 23 N. J. Eq. 96, the same principle is recognised. In the latter case, the church held a mortgage of $2000 upon the residence of their minister. Difficulties having arisen between the people and the minister they agreed to release the mortgage if he would resign. Upon the faith of this promise he did resign, and it was held, that the resignation being a voluntary act was a sufficient consideration to support the promise of a release. An injunction restraining proceedings upon the mortgage was granted. There is quite an elaborate discussion of the status of a clergyman of the Protestant Episcopal Church in the *St. Clement's Church case*, 8 Phila. 251, where an injunction was granted to restrain a vestry from ejecting a rector from a parish without a formal trial according to the canons of the church, the court saying, "Can a rector be dismissed without his consent by virtue of the charter and by-laws of St. Clement's Church, or by virtue of any canonical law or laws whatever of binding force in the Protestant Episcopal Church? * * Can it be possible that any minister may be summarily ejected from his parish without a trial? Shall the law guarantee to the humblest citizen a hearing, and may an ordained and duly instituted minister be denied a right as common as this one? * * * I am of opinion that under the existing laws of the church, the civil contract cannot be broken without an accusation and trial."

2. Though the settlement of a minister over a congregation is theoretically for life, and though he cannot be dismissed by the congregation without his consent, it is obvious that occasions will arise when congregations may properly ask to be relieved from the continuance of a relation when owing to supervenient causes not in contemplation at the time of settlement, a minister cannot, or will not, any longer perform the duties of his office to the profit and edification of the church, and though the congregation may not be permitted to judge when that condition of affairs exists, it is in the nature of things necessary that there should be a tribunal before whom such questions can be settled. As the calls extended to ministers are usually in form an invitation for a settlement for the performance of the work of the min-

istry in accordance with the constitutions of the church with which the particular congregation is connected, and as these constitutions provide judicatories and tribunals for the trial of disputes arising between ministers and congregations, it is not necessary to go beyond the terms of the contract. In cases where the contract does not contain an express reference to these constitutions, it has been repeatedly decided that there is an implication that the contract has been made subject to them. Hence, although a congregation cannot at their own pleasure dismiss a minister regularly settled over them, if the minister can no longer perform the duties of his office to the profit and edification of the church, a complaint may be presented to the proper ecclesiastical judicatory, and after having it before them, if proper cause is shown, the relation will be dissolved. The doctrine was recognised in *Avery* v. *Tyrringham*, *supra*, where the court, after denying the right of the congregation to dissolve the relation, said, "In a proper case an ecclesiastical council will be called, and their decision is binding," and in *Gibbs* v. *Gilead Society*, *supra*, it was said, "The contract was in the form usually adopted, and it is undoubtedly true that such settlements are by implication for the work of the gospel ministry according to the polity of the congregational denomination of Christians, and subject to their platforms, constitutions and usages, and the contract for the payment of salary is dependent upon the existence of the pastoral relation, and ceases to be operative whenever that relation ceases to exist. The relation though theoretically formed for life can be severed for cause by the formal action of the consociation with which the church is connected." The most elaborate discussion of the rationale and necessity of this doctrine will be found in the case of *Connitt* v. *Reformed Dutch Church*, 4 Lans. 339; 54 New York 551. Connitt, a minister of the Reformed Dutch Church, was settled over a church at New Prospect. In consequence of certain internal troubles a majority of the congregation presented a petition to the classis asking for a dissolution of the relation, which petition after hearing was granted, an appeal was taken by Connitt to the General Synod of the church, but the decree of the classis was sustained. In a subsequent civil action against the church for the amount of his salary, Connitt denied the power of the church judicatories to dissolve the pastoral relation. The court, after reviewing at length the constitution of the church with its organized series of church courts, consistories, classes, particular synods, and general synods, and the subjection of the ministry in their ecclesiastical relations to the decrees of these bodies as they appeared at large in the canons, said, "It was clearly intended to provide by means of the four judicatories a complete system of ecclesiastical government and discipline for the churches and congregations and all their officers, in order that the doctrines of the church might be faithfully taught, order preserved, and the prosperity and the growth of the church promoted. The classis has complete and full ecclesiastical jurisdiction over the pastors and churches within its bounds. If it has not, where has such jurisdiction been lodged. It cannot be doubted that it was intended to be vested in some or all of the church judicatories. If it was not, then the form of church government provided was incomplete. While the classis has power to license, ordain, suspend and depose ministers to and from congregations, and to supervise the teaching of doctrines therein, and while no pastor can be called or dismissed to another congregation without its consent, can it be supposed that the power to dissolve the pastoral relation is lodged nowhere?

"There are numerous reasons not

affecting the religious or moral character of a pastor, such as the condition of his family, his own weaknesses, foibles, manners, eccentricities, infirmities of temper or mere indiscretion, which might render his services ineffectual for good and possibly productive of evil in a congregation. In such cases the exigencies may be such that the very life and existence of the church depend upon his removal. Strife and bitterness may have been so far engendered that they are irreconcilable. The flock may have been so far scattered and diminished that the consistory cannot pay the pastor's salary. What can be done in such a case? As I understand the claim of Mr. Connitt, there is no remedy, unless the pastor will consent to a dissolution of the pastoral relation; the consistory alone cannot effect it, and there is no jurisdiction in any of the church judicatories to effect it. Considering the general frame of the church government, the objects to be attained thereby, the distribution and division of the various powers among the several judicatories, and the oversight and care of the churches within its bounds conferred upon classis, I am of opinion that it had inherent power to dissolve the pastoral relation. This relation and the manner in which the pastor discharges his duties, involving the spiritual welfare of the congregation and to some extent the character of the church organization, are proper subjects of ecclesiastical jurisdiction."

In *The Dutch Church of Albany* v. *Bradford*, 8 Cowen 457, where a minister, subsequently to his settlement over a church, had fallen into habits of intemperance, which rendered him incompetent of performing his pastoral duties, in consequence of which he was suspended by the classis, the court refused to admit evidence offered for the purpose of contradicting the finding of the classis, and further held, that in an action to recover arrears of salary for the period intervening between the presenting of the complaint to, and the decree of suspension by, the classis, he, having during that period, according to the finding of classis, been incapable of properly performing his pastoral duties, was not entitled to any salary, the court saying: "A contract to act as minister of the Reformed Dutch Church, for which the particular church is to pay a stated salary, founded upon a call referring to the rules of church government established at the Synod of Dort, is not an exception to the general rule which makes performance, or ability and readiness to perform a contract of labor, a condition precedent to the price becoming due."

When, however, a congregation is entirely independent of the supervision of any superior ecclesiastical judicatory, as in the Associate Presbyterian Church, the presbytery, being a mere voluntary body having no legal constitutional powers, cannot deprive a congregation of a minister with whom they are satisfied without their consent: *Smith* v. *Nelson*, 18 Verm. 511; and where the charter of a Lutheran congregation, which is independent of all superior ecclesiastical judicatories, invested the board of trustees of the corporation with the power of selecting a minister, a court of equity will not enjoin them from preventing a minister from exercising the functions of his office, who was elected to the office of pastor by a majority of the congregation, contrary to the will of the trustees. *Lawyer* v. *Capperly*, 7 Paige 281.

In *Church* v. *Clark*, 25 La. Ann. 282, the charter of a Free African Church, investing the trustees of the church with the power of selecting a minister, was held to render them independent in this matter of the control of the Bishop of Louisiana, who appointed a minister of his own selection over them.

3. The third question relating to the power of the civil courts to re-examine questions passed upon by ecclesiastical courts, presents greater difficulties, and has been the subject of somewhat different opinions, as is seen from the foregoing opinion; and yet a careful examination of the facts in the cases criticized will show that the confusion which has been introduced into this branch of the law has resulted more from an occasional perhaps too broad statement of principles on which cases have been decided, when the principle is stated without a reference to the facts upon which the principle stated is predicated, than any inherent difficulty in the subject itself. Probably the clearest short statement of the true rule upon this subject is found in the opinion of Chancellor JOHNSON, in *Harmon* v. *Dreher*, 2 Speer's Eq. Cas. (S. C.) 82: "When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide, and the civil tribunal tries the civil right and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them." The civil courts will not undertake, under any circumstances, to enforce rights purely ecclesiastical: as, for example, the right to be admitted to the communion; or redress wrongs purely ecclesiastical: as, for example, the excommunication of one found by a church tribunal to be an unworthy member.

In *Shannon* v. *Frost*, 3 B. Mon. 253, it was said: "The court having no ecclesiastical jurisdiction can only pass on questions of property, not on questions of church discipline. We cannot decide who ought to be members of the church, or whether the excommunicated have been justly or unjustly cut off. The excommunication is conclusive proof that the persons expelled are not members." And in *Seibert* v. *Church*, 3 Barr 282, where the charter of a church provided that none but members of the church should be corporators, one of the members having been tried and excommunicated, asked for a mandamus against the church to restore him to his standing as a member of the corporation, upon the ground that the trial had not been conducted in accordance with the constitution of the church. This the court refused to grant, saying: "The church judicatories consist of three heads—the consistory, the classis and the synod; and by the sixth article it is provided that when any person may think himself aggrieved by the decision of a lower judicatory, he has a right to appeal to a higher, and whatever is concluded in such judicatory by a majority of votes is valid and binding, unless it can be shown to be contrary to the word of God and the constitution of the church. The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Any other than those must be incompetent judges of matters of faith, discipline and doctrine, and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals." It was, however, intimated in the opinion that if a church, in defiance of the decrees of the supreme judicatory, should refuse to admit a member to exercise his rights as a corporator, a mandamus would be granted, and in the case of *Green* v. *African M. E. Church*, 1 S. & R. 254, a return to a mandamus to compel the respondents to restore the relator to his rights as a corporator, was held insufficient, which set up that the relator had been tried and expelled by a select number of the society, and in the presence of three

deacons and a preacher; but it was not shown of how many this select number consisted, or by what authority they proceeded to try and expel a member.

So also in *People ex rel. Dutcher* v. *St. Stephen's Church*, 6 Lans. 172, one who had been expelled from a church organization sought by a mandamus to be restored to his rights as a corporator. The court said: "With the action of a church as a religious body we have nothing whatever to do, and we decline altogether to enter upon any review of its action in expelling the relator from the church, acting as a religious body. We have power to regulate the proceedings of the church corporation as a legal being only, and if it has deprived the relator of any of his legal rights as a member of the corporation, it is our duty to compel them to reverse their action and restore him to the enjoyment of such rights."

The enforcement of purely ecclesiastical rights and the investigations of questions of faith, discipline and doctrine, is a branch of English ecclesiastical law which happily has never been incorporated into our system, and which never can be while the American church and state maintain their independent relations. For a very curious and interesting case, showing the extent of the English jurisdiction in this matter, see *Jenkins* v. *Cook*, Law Rep. 4 Ad. & Ec. 463, and 1 Pro. & Div. 80. But though our courts refuse to entertain jurisdiction in the class of cases already mentioned, yet in cases where a civil right, as the right to the possession of church property, or the right to the payment of a sum of money as salary for services rendered under a contract with an ecclesiastical body, the machinery of the law will be set in motion. If, however, the civil right, which is the subject of adjudication, is based upon or springs out of some ecclesiastical right or relation, which has been the subject of adjudication in an ecclesiastical court, the finding of that court will be taken as an established factor in the cause. This doctrine is recognised and enforced in *Connitt* v. *Church*, *supra*, "The relation of pastor and people is purely ecclesiastical, and the ecclesiastical tribunals alone have cognizance of it. The civil contract is necessarily a conditional one, dependent upon the existence and continuance of the ecclesiastical relation. The church at New Prospect is attached to the religious denomination known as the Reformed Church in America, and is under the ecclesiastical order and government of said church. The call, pursuant to which Mr. Connitt became the pastor of the church at New Prospect, is based upon that fact, and the undertaking of the consistory of that church to pay him a salary of $800, and allow him the use of the parsonage so long as he shall continue the minister of the church, is in subserviency to the ecclesiastical rule, and the continuance of the relationship between him and the church is dependent upon the administration of such rule by the ecclesiastical judicatories. While the civil courts have jurisdiction over the civil contract by which Mr. Connitt is entitled to his salary and the use of the parsonage they have no jurisdiction over the relation of pastor and people and cannot lengthen or abridge its continuance. We cannot fail to see that the pastoral relation established in this case was as purely ecclesiastical as that in which Mr. Connitt stood as minister in the Reformed Church of America. His rights and duties as minister and as pastor were ecclesiastical, not civil, and the ecclesiastical courts alone could suspend or depose him from the ministry or dissolve the pastoral relation which existed between him and the church. His duties as minister when placed over this church were of a character peculiarly within the cognizance of the authorities of the church organization to which he be-

longed, and were to be performed in pursuance of the rules and usages of that organization; as minister and pastor he was amenable to no other organization, and such organization, through its different instrumentalities, consistories, classes and synods, had entire control of both pastor and people in all ecclesiastical matters. The secular courts have no jurisdiction over the ecclesiastical rights of either pastor or people, and neither can resort to those courts for the protection or enforcement of those rights. The fact that the civil contract is subsidiary to this relation does not serve to bring this within the jurisdiction of the civil authorities. We cannot inquire whether the church judicatories have proceeded according to the laws and usages of their church, nor whether they have decided the matter correctly. It is the settled law of this country that in such cases the civil courts must take the decisions of the ecclesiastical courts as final and binding upon the parties." In *Baptist Church* v. *Wetherill*, 3 Paige 296, Chancellor WALWORTH said, "Over the church as such the legal or temporal tribunals of this state do not profess to have any jurisdiction whatever, except so far as is necessary to protect the civil rights of others and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatories, to which they have voluntarily subjected themselves. But as a general principle those ecclesiastical judicatories cannot interfere with the temporal concerns of the congregation or society with which the church or the members thereof are connected." To the same effect is *Miller* v. *Gable*, 7 Paige 281, 2 Denio 492. In the celebrated case of *Chase* v. *Cheney*, 10 Am. Law Reg. 295, 58 Ill. 509, an injunction to restrain an ecclesiastical court regularly organized according to the canons of the Protestant Episcopal Church from trying the complainant for an alleged departure in doctrine from the standards of the church, was refused.

How far the civil courts will inquire into the jurisdiction of a body professing to be an ecclesiastical tribunal with power to determine ecclesiastical disputes may as yet be a somewhat open question. In *Watson* v. *Jones*, 11 Am. Law Reg. 430, 13 Wall. 679, the court, although admitting that adjudications by ecclesiastical courts upon questions not ecclesiastical are of no force, proceeded to say, "But it is a very different thing where a subject-matter of dispute strictly and purely ecclesiastical in its character—a matter over which the civil courts exercise no jurisdiction—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that in its judgment it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination, may and must be examined into with minuteness and care, for they would become in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil courts. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord ELDON in *Attorney-General* v. *Pearson*, 2 Bligh 529, and would in effect transfer to the

civil courts where property rights were involved the decision of all ecclesiastical questions." The case which called forth this opinion was to determine which of two conflicting bodies were the true session of a Presbyterian church in Kentucky, and as such session entitled to the possession of the church edifice. In *Watson* v. *Farris*, 45 Mo. 483, a case arising out of the same unfortunate controversy between the northern and southern branches of the Presbyterian Church, commonly known as the "declaration and testimony controversy," a quo warranto was sought for to determine who were the legal trustees of Lindenwood College, an institution under the care of the Presbytery of St. Louis. The General Assembly of the church had passed upon the question, and in this action an attempt was made to have their decision rendered inoperative; the court, however, said, "The General Assembly is the highest court or judicatory known to the Presbyterian Church; it possesses extensive original and appellate jurisdiction, and whether the case in the matter of the declaration and testimony signers was regularly or irregularly before it was a subject for it to determine for itself, and no civil court can revise, modify or impair its action in a matter of purely ecclesiastical concern. The utter impolicy of the civil courts attempting such interference is apparent. It would involve them in difficulties and contentions, and impose upon them duties which are not in harmony with their proper functions."

In *Bouldin* v. *Alexander*, 15 Wall. 131, however, the complainants showed a *prima facie* title as trustees of an African Baptist church, the defendants answered that the complainants had been expelled at a regular church meeting; but the court, following *Green* v. *African Church*, *supra*, held that this answer did not prevent an inquiry "whether the resolution of expulsion was the act of the church or of persons who were not the church, and who consequently had no right to excommunicate others. And thus inquiring we hold that the action of the small minority by which the old trustees were attempted to be removed and by which a large number of the church members were attempted to be exscinded, was not the action of the church, and that it was wholly inoperative. In a congregational church the majority, if they adhere to the organization and the doctrines, represent the church. The expulsion of a majority by a minority is a void act."

In *Gartin* v. *Penick*, 5 Bush 110, a case involving the question which of two contending parties, one adhering to the Northern, the other to the Southern Presbyterian Church, was entitled to the possession of a church edifice, the court said, "From the pleadings and the proofs the judicial deduction is inevitable, that the appellants and appellees constitute separate and antagonistic churches, each claiming to be the church to which the property in litigation was dedicated, and consequently the question now to be decided is one of identity, involving in its solution the equitable title to property dependant on contract which this court must, when as in this case appealed to interpret and uphold, as well between ecclesiastical as civil bodies or any other parties. The contract is purely civil and not ecclesiastical, and the usufructuary rights resulting from it depend on the laws of the land and not on the arbitrium of the General Assembly, which has no civil power, but within the limits of the political and ecclesiastical constitutions has supreme and final jurisdiction over church doctrines and discipline. The jurisdiction of the civil tribunals over church property does not, therefore, conflict with the exclusive jurisdiction of the General Assembly in the plenitude of its ecclesiastical power, either legislative or judicial. Without interfering

with religious liberty this court could not control, or mould the faith or doctrines of the church, nor could it consistently with the spirit of our institutions authoritatively settle questions of orthodoxy or optimity among professing Christians. But so far as the identity of the respective claimants with the beneficiary to whom the church property was dedicated may be affected by their doctrines or by the acts of the General Assembly the essential coincidence of the doctrines and the legal effect of those acts must necessarily be considered for the purpose of deciding the question of title to the property, without concluding the General Assembly in any way in its own proper jurisdiction in its ecclesiastical domain."

In *McAuley's Appeal*, 27 P. F. Smith 397, a case involving the title to certain real estate, the Supreme Court of Pennsylvania, in reviewing and holding void a decree of the synod dissolving the Presbytery of Philadelphia, said, "That the decree of the synod which sought to accomplish this result was unlawful and revolutionary will the more fully appear upon consideration of its legitimate powers. These are of two kinds, legislative and judicial. Under the first it might have dissolved the Presbytery of Philadelphia, and assigned its churches to some other existing presbytery, or to such new one as it might choose to erect. Under the second of the powers it might, for proper cause and in due form, depose any of its presbyters, or dissolve any of its churches and reorganize them. We may concede that the first, in the case mentioned, might be exercised arbitrarily, for that involves but a matter of church polity which from its very nature must rest largely in the discretion of the Superior Court, but the exercise of the second in such manner involving as it necessarily must important civil rights cannot be tolerated. Had the synodical decree which we are asked to enforce been founded upon some semblance of legal process it might have been sustained, but, as it is wholly without such foundation, it must be regarded as nugatory."

This case would seem to follow the doctrine of the Kentucky cases, as distinguished from *Watson* v. *Jones*, *supra*. The court, however, were not unanimous, AGNEW, C. J., and SHARSWOOD, J., delivering dissenting opinions (2 Weekly Notes of Cases 77), in which they said: "The synod had acted within the general powers already quoted from discipline, to direct its members, to supervise inferior judicatories, to direct the exercise of discipline throughout every part, to examine the proceedings of inferior judicatories, to ascertain whether they faithfully discharge their duties, &c. And even admitting that they may have acted in these matters irregularly, yet it was upon matters within their just powers, and therefore not *ipso facto* void and to be contemned or disobeyed. The synod was the proper and only judge of its own members and their qualifications. If they erred in the mode of their action or proceeded irregularly, still they acted upon matters within their authority, and their acts were not absolutely void, deserving of contempt and to be disobeyed. * * * The synod was the highest judge of its own order, and if, in the opinion of the presbytery, it did not proceed correctly, it did not become the presbytery to fly in the face of its superior and suspend their relations thereto." The majority of the court in this case may have deemed well founded the distinction which was made in the argument between this case and *Watson* v. *Jones*, that in the latter case the pleadings put in issue only the titles of the elders as ecclesiastical officers, while in the case before them the right to the possession of real estate was the matter of dispute.

There are several interesting questions which may be here noticed as

bearing collaterally upon the questions discussed. *Lucas* v. *Case*, 9 Bush 297, was an action for libel against a committee of the church of which the plaintiff was a member, and before whom he had been summoned to answer a charge of immorality. The committee found him guilty of the charge and so reported. The court held the action could not be maintained, saying, "In pronouncing the result of their deliberations, in reporting the same in writing to the church they will be protected by the law, if they acted in good faith and within the scope of their authority. Whether in what the church did it acted right or wrong, this court cannot approach its precincts to inquire, and is powerless to redress any alleged wrong inflicted on the plaintiff thereby. By becoming a member of the church he subjected himself to its ecclesiastical power, and neither this nor any earthly tribunal can supervise or control that jurisdiction."

McMillan v. *Birch*, 1 Binn. 178, was an action of slander. The defendant, a Presbyterian minister, having been cited by the plaintiff, also a minister, to answer before presbytery for unchristian conduct and teaching, in his defence before the presbytery called the plaintiff "a liar, drunkard, and preacher of the devil," and it was held that as the words had been spoken in a quasi court of justice, without any evidence of express malice, they were in the nature of a privileged communication and not actionable.

Dieffendorf v. *The Reformed Church*, 20 Johns. 12, was an action against a subscriber to recover the amount of his subscription to the support of a minister. The defendant offered to show that the minister was a man of immoral character, but as it appeared that this charge had been preferred before a church judicatory and by them tried and dismissed, the evidence was not admitted.

The signing of a subscription paper, whereby the defendants agree to contribute the sums severally affixed to their names for the support of a minister, does not render them jointly liable for the whole salary, but each one may be sued for the amount of his individual subscription: *Riddle* v. *Stevens*, 2 S. & R. 537.

But, though the decrees of ecclesiastical courts may not be reviewed by the civil courts, when the subject-matter of the decree is ecclesiastical, if an ecclesiastical court undertakes to legislate in affairs purely temporal, their proceedings are purely *ultra vires* and void, as when a board of reference, appointed under the canons of the Protestant Episcopal Church, endeavored to adjust certain pecuniary disputes which had arisen between a rector and his parish, on account of money advanced and expended by the rector in the construction of a chapel. An award by the board in a case of this kind is of no force at all: *Bradbury* v. *Birchmore*, 117 Mass. 569.

R. C. D., Jr.

Supreme Court of Vermont.

DORAN *v.* SMITH.

Infancy is a bar to an action on the case for false and fraudulent representations by a vendor or pledger as to his ownership of property sold or pledged.

Case. The declaration alleged, that the defendant at, &c., on, &c., intending to deceive and defraud the plaintiff, and to induce him to purchase a certain gold pin then and there in the hands and possession of the defendant, did falsely, fraudulently, and deceitfully